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Utah Supreme Court

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04 FEB 1976

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

D. R. MILLER,

Plaintiff/Appellant,

vs.

Case No. 13984

PAUL KAYE, dba
SHRINE CIRCUS,

Defendant/Respondent.

APPENDIX OF PLAINTIFF/APPELLANT

Appeal from Judgment of the Third Judicial
District Court, Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, Sr., Judge

CRAIG S. COOK of
WORSLEY, SNOW & CHRISTENSEN
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Salt Lake City, Utah 84101
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FILED
JUN 10 1975

Clerk, Supreme Court, Utah

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D. R. MILLER,)	
)	
Plaintiff,)	
)	
-vs-)	No. 220306
)	
PAUL KAYE d/b/a SHRINE)	<u>Memorandum Decision</u>
CIRCUS,)	
)	
Defendant.)	

The above-entitled matter came on regularly for hearing on the 4th day of November, 1974, and was concluded on the 6th day of November, 1974. Plaintiff was represented by Boyd M. Fullmer. The defendant was represented by LeRoy S. Axland.

Testimony was adduced on behalf of both parties in connection with their various contentions. The matter was argued and submitted, and the Court, now being fully advised in the premises, finds and concludes as follows:

1. That the ^{defendant is} ~~plaintiff was~~ the owner of the elephant. In reaching this conclusion the Court will recall to counsel that the plaintiff was unable to recall, until the noon recess of November 4th, a meeting he had with the defendant in Little Rock, Arkansas, in 1974, and after that recess was able to recall a meeting with the defendant in a motel wherein lease and sale of an elephant was discussed. Finally after that a lease agreement was apparently arranged and confirmed by the telegram which was introduced in evidence.

It is hard for the Court to believe that on July 11, 1973, when the defendant mailed a check for \$600.00 that a letter was not likewise sent with the check. It appears from the testimony that the plaintiff particularly is a man greatly involved in the circus and elephant business and

in the United States and traveling and being as busy as he apparently is it is just as likely that he received the letter with the check of July 11th and forgot it or overlooked it as it was with his testimony in connection with the meeting in Little Rock. Further, leasing and selling was discussed in many of the subsequent conversations, and it appears strange to the Court that the plaintiff would allow the elephant in question to remain with the defendant for almost a year and then not make any move until he received the check for \$2,950.00 which contained thereon the writing, "In full payment for the Elephant Peggy." No action was taken on his part within the time required by the Uniform Commercial Code, and it is based on the foregoing statements and others that the Court could further elaborate on that the Court reaches the conclusion that the plaintiff was the owner.

2. As to damages in connection with the attachment made by the plaintiff in June of 1974, the Court finds that the defendant is not entitled to any damage. The effort made by the plaintiff to obtain the elephant through the attachment in question or levy, whichever term the parties prefer to use, was certainly not done maliciously or wilfully in the sense that the plaintiff was intending to harm the defendant in any way, and further the showing of any damage by the defendant was so nebulous that the Court could not make a finding thereon.

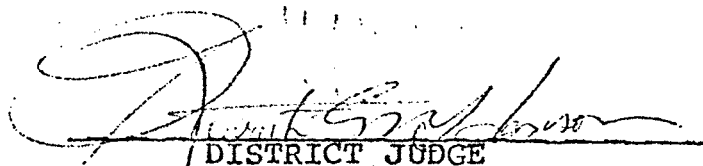
3. The defendant is hereby ordered to reissue a check in the sum of \$2,950.00, being the balance due and owing on the elephant. The defendant is directed to deliver at his expense the elephant as far as Salt Lake City and the expense of transporting from Salt Lake City to any other place by the

Both parties are to bear their own costs, and the Court hereby orders that the bond in the sum of \$15,000.00 be released and the plaintiff and bonding company from any and all obligations thereunder.

Defendant's counsel is respectfully requested to prepare the necessary Findings, Conclusions and Judgment reflecting what the Court has attempted to set out above.

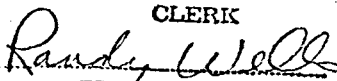
Dated: November 6, 1974.

BY THE COURT:


DISTRICT JUDGE

ATTEST

W. STERLING EVANS
CLERK

BY 
Deputy Clerk

STATE OF UTAH

* * * * *

D. R. MILLER,

Plaintiff,

vs.

PAUL KAYE, dba SHRINE CIRCUS,

Defendant.

:

:

:

:

:

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. 220306

* * * * *

The above-entitled matter came on regularly for hearing before the Honorable Stewart M. Hanson, Sr., District Judge, on Monday, November 4, 1974, plaintiff appearing in person and by and through his counsel of record Boyd M. Fullmer, Esq., defendant appearing in person and by and through his counsel of record LeRoy S. Axland of and for PARSONS, BEHLE & LATIMER, the Court having heard the testimony of the witnesses, received the exhibits, having reviewed the Memoranda and arguments of counsel and being fully advised in the premises makes the following.

FINDINGS OF FACT

1. Plaintiff is a resident of the State of Oklahoma doing business in the name and style of Carson & Barnes Circus.
2. Defendant is a resident of the State of California doing business in the name and style of Entertainment Enterprises, Kaye Continental Circus and Clarisma Associates.

things, of buying, selling and leasing circus animals, especially elephants, and has been so engaged for more than twenty (20) years. Plaintiff is recognized in the circus industry as a leading and respected elephant dealer.

4. Defendant is engaged in the business, among other things, of producing circuses including the buying, selling and leasing of circus animals and has been so engaged for more than twenty (20) years. Defendant is recognized in the circus industry as a leading and respected circus animal dealer.

5. Beginning in November, 1972 plaintiff and defendant's wife engaged in preliminary discussions toward the purchase by defendant from plaintiff of an elephant to replace an elephant which had to be destroyed by defendant in August, 1972.

6. On August 15, 1973 plaintiff and defendant met in a motel room near Little Rock, Arkansas to discuss the acquisition by defendant from plaintiff of a specific eight or nine year old female Asiatic elephant named Peggy. Both lease and sale of the animal were discussed and at the conclusion of the discussions the parties determined that defendant would lease Peggy from plaintiff for a rental payment of \$150.00 per week for fifteen out of the first twenty weeks of the lease and that should defendant subsequently determine Peggy to be satisfactory for defendant's uses, defendant could purchase Peggy and that the lease payments already made would be applied toward the purchase price.

7. At sometime subsequent to April 15, 1973 and prior to April 28, 1973 Manuel King, an agent and employee of plaintiff telephoned defendant and advised defendant that the purchase price for Peggy would be \$5,000.00.

telegram memorializing the lease agreement and paid plaintiff the initial three week lease payments of \$450.00 by means of a telegraphic money order. This telegram and the telegraphic money order were received by plaintiff and possession of Peggy was delivered over to agents of defendant on or about May 3, 1973.

9. On July 3, 1973 plaintiff wrote defendant requesting lease payments on Peggy for the six week period from May 24, 1973 to July 5, 1973. Subsequently, on or about July 8 or 9, 1973, plaintiff and defendant had a telephone conversation wherein defendant told plaintiff that defendant considered Peggy to be satisfactory and that defendant desired to purchase Peggy as previously discussed and to apply the lease payments already made toward the \$5,000.00 purchase price. Plaintiff at that time concurred in these terms and conditions of sale.

10. On July 11, 1973 defendant wrote plaintiff a letter confirming the telephone conversation of July 8 or 9, 1973 setting forth the purchase price for Peggy of \$5,000.00, that the lease was terminated, that rentals previously paid would apply against the purchase price and that the balance of the purchase price would be paid within one year. Defendant additionally prepared a check made payable to plaintiff in the face amount of \$600.00 dated July 11, 1973 and forwarded the letter and the check to plaintiff at plaintiff's address in Hugo, Oklahoma..

11. The confirmatory letter of July 11, 1973 and defendant's check to plaintiff in the face amount of \$600.00 were received by plaintiff while plaintiff was traveling with the Carson & Barnes Circus; the check was recorded in plaintiff's records by plaintiff's bookkeeper on November 22, 1973 and was

no time did plaintiff give defendant written notice of plaintiff's objection to the contents of the July 11, 1973 letter.

12. On November 4 or 5, 1973 in Kansas City, Missouri defendant authorized defendant's agent to deliver the sum of \$1,000.00 in cash to plaintiff when defendant's agent and plaintiff would be in Fort Worth, Texas on November 20, 1973. Subsequently, on November 20, 1973 this cash payment was made by defendant's agent to plaintiff and plaintiff acknowledged receipt of the \$1,000.00.

13. Defendant retained possession of Peggy during the fall and winter of 1973 and the spring and summer of 1974 although Peggy was not producing any income for defendant from November, 1973 through April, 1974.

14. On May 12, 1974 Manuel King, plaintiff's agent and employee, telephoned defendant in Duluth, Minnesota and told defendant that plaintiff required further payments on Peggy. Defendant thereupon prepared a check in the face amount of \$2,950.00 payable to plaintiff and typed a legend on the reverse side of the check as follows: "Final payment in full for elephant Peggy." This check of May 12, 1974 was mailed from Duluth, Minnesota on May 13, 1974 to plaintiff in North Platte, Nebraska and was received by plaintiff on May 17, 1974 in North Platte. The check of May 12, 1974 has never been presented by plaintiff to defendant's bank for payment.

15. The legend on the reverse side of the May 12, 1974 check was immediately brought to plaintiff's attention by his bookkeeper on May 17, 1974. At no time after May 17, 1974 did the plaintiff give defendant written notice of plaintiff's

16. On June 14, 1974 plaintiff caused a Complaint to be filed in this matter and by virtue of posting a \$15,000.00 cash bond obtained a Writ of Replevin as to Peggy and Peggy was replevined by the Salt Lake County Sheriff on the afternoon of June 14, 1974. Pursuant to a Court order obtained by defendant, Peggy was returned to defendant for the evening show on June 14, 1974 as well as the two shows for Saturday, June 15, 1974 in the Salt Lake City and the four shows in Ogden, Utah. On June 19, 1974 pursuant to Court order Peggy was returned to plaintiff and has been in plaintiff's possession ever since and is currently being maintained by plaintiff at Hugo, Oklahoma.

17. Defendant is the owner of Peggy and is obligated to pay the balance of the \$5,000.00 purchase price or \$2,950.00 to plaintiff. Plaintiff is obligated to return Peggy to defendant at Salt Lake City, Utah at plaintiff's expense with defendant being obligated to pay all transportation expenses for Peggy from Salt Lake City to wherever defendant desires.

18. Plaintiff and defendant are each to bear their own costs of Court and attorney's fees. Plaintiff is awarded his replevy bond in the amount of \$15,000.00 less the sum of \$2,950.00 to be retained by the Clerk of Court pending return of Peggy by plaintiff to defendant; the Clerk of Court is authorized to release the balance of \$2,950.00 to plaintiff upon being advised by defendant that Peggy has been delivered.

From the foregoing Findings of Fact the Court now makes and enters the following Conclusions of Law.

1. Plaintiff and defendant are merchants of circus animals, more especially elephants, and as such are bound by

2. That a sale was effectuated of the elephant Peggy from plaintiff to defendant on July 8 or 9, 1973 for the total purchase price of \$5,000.00 with all prior rental payments to be applied toward the purchase price. This sale was confirmed by letter of July 11, 1973 from defendant to plaintiff and the contents thereof were not objected to by plaintiff at anytime after receipt.

3. Defendant has paid to plaintiff the sums totalling \$2,050.00; there is a balance due to plaintiff from defendant of \$2,950.00 on the purchase price and defendant is obligated to plaintiff in the amount of \$2,950.00. Defendant is awarded ownership of the female Asiatic elephant Peggy at this time.

4. Plaintiff is obligated to pay the transportation charges or arrange for the transportation of Peggy at plaintiff's expense from Hugo, Oklahoma to Salt Lake City, Utah and defendant is obligated to pay all such transportation expenses for Peggy from Salt Lake City, Utah to wherever defendant desires.

5. Plaintiff and defendant are each to bear their own costs of Court and attorney's fees. Plaintiff is awarded immediate return of \$12,050.00 of the \$15,000.00 Replevy Bond with the balance of \$2,950.00 to be retained by the Clerk of Court pending actual return of Peggy by plaintiff to defendant. Upon receiving satisfactory proof that Peggy has, in fact, been returned by plaintiff to defendant, the Clerk of Court is authorized to release the remaining \$2,950.00 to plaintiff.

DATED this 8th day of November, 1974.

BY THE COURT:

ATTEST

W. STERLING EVANS

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STATE OF UTAH

* * * * *

Bk 131 No. 1853
11-11-74 9:12 A.M.

D. R. MILLER,

Plaintiff,

vs.

PAUL KAYE, dba SHRINE CIRCUS,

Defendant.

J U D G M E N T

Civil No. 220306

* * * * *

The above-entitled matter came on regularly for hearing before the Honorable Stewart M. Hanson, Sr., District Judge, on Monday, November 4, 1974, plaintiff appearing in person and by and through his counsel of record Boyd M. Fullmer, Esq., defendant appearing in person and by and through his counsel of record LeRoy S. Axland of and for PARSONS, BEHLE & LATIMER, the Court having heard the testimony of the witnesses, received the exhibits, having reviewed the Memoranda and arguments of counsel and being fully advised in the premises, it is now ORDERED, ADJUDGED, AND DECREED:

1. That ownership of the female Asiatic elephant Peggy is confirmed in defendant. Defendant is hereby obligated to pay to plaintiff the sum of \$2,950.00 representing the balance of the \$5,000.00 purchase price for Peggy.

2. Plaintiff is obligated to pay the necessary transportation expenses or to provide transportation of the elephant Peggy from Hugo, Oklahoma to Salt Lake City, Utah with

defendant being obligated to pay transportation charges for Peggy from Salt Lake City, Utah to wherever defendant desires.

3. Plaintiff and defendant are each to bear their own costs of Court and attorney's fees. Plaintiff is awarded immediately \$12,050.00 of his \$15,000.00 Replevy Bond with the balance of \$2,950.00 to be retained by the Clerk of Court pending return of Peggy by plaintiff to defendant. Upon receiving satisfactory proof that Peggy has, in fact, been returned by plaintiff to defendant, the Clerk of Court is authorized to return to plaintiff the balance of the \$2,950.00 on the Replevy Bond.

DATED this 8th day of November, 1974.

ATTEST
W. STERLING EVANS
CLERK
BY Randy L. Wells
Deputy Clerk

BY THE COURT:

Robert S. Fullmer
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

This is to certify that a true and correct copy of the above and foregoing Judgment was delivered to Boyd M. Fullmer, Esq., 540 East Fifth South, Salt Lake City, Utah, this 8th day of November, 1974.